



**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**  
Washington, D.C. 20460

OFFICE OF  
GENERAL COUNSEL

November 29, 2021

**MEMORANDUM**

**SUBJECT:** Impartiality Determination to Participate in Certain Specific Party Matters  
Involving the State of Colorado

**FROM:** Justina Fugh  
Alternate Designated Agency Ethics Official and Director, Ethics Office

**TO:** K.C. Becker  
Regional Administrator  
Region 8

As Regional Administrator for the United States Environmental Protection Agency (EPA) Region 8, you seek permission to participate in specific party matters involving the State of Colorado. Within the last year, prior to being selected for this position, you served as an elected member of the Colorado House of Representatives.

Pursuant to Executive Order 13989 and the Biden Ethics Pledge that you signed upon appointment, political appointees are prohibited from participating in specific party matters in which their former employer or former client is a party. However, state government is excluded under the definition of "former employer."<sup>1</sup> Therefore, the Ethics Pledge does not apply to your State of Colorado employment.

I understand that you have a defined benefit plan with the State of Colorado. As such, you have a financial conflict of interest pursuant to 18 U.S.C. § 208. Under this criminal statute, you cannot participate personally and substantially in any particular matter that will affect the State's ability or willingness to honor its contractual obligations with respect to your state retirement interests. In the Agency's experience, it is unlikely that you as the Regional Administrator will be in any position to affect the State's ability or willingness to pay these benefits to its retirees. I do not expect, then, that 18 U.S.C. § 208 will prohibit you from carrying out your official EPA duties.

However, what remains is an impartiality concern. The applicable ethics rules are set forth in the Standards of Ethical Conduct for Employees of the Executive Branch, 5 C.F.R. Part

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<sup>1</sup> See Exec. Order 13989, Section 2(k), which provides that "'former employer' does not include...State or local government."

2635, specifically Subpart E, “Impartiality in Performing Official Duty.” Upon assuming the position of Regional Administrator, you will have a “covered relationship” with the State of Colorado pursuant to 5 C.F.R. § 2635.502(b)(1)(iv). For one year after January 13, 2021 when you left office, absent an impartiality determination from an EPA ethics official, you cannot participate in any specific party matter in which the State of Colorado is a party or represents a party if that matter is likely to have a direct and predictable effect upon the State or if the circumstances would cause a reasonable person with knowledge of the relevant facts to question your impartiality. *See* 5 C.F.R. § 2635.502(a).

Federal ethics regulations permit federal employees to participate in matters that might raise impartiality concerns when the interest of the federal government in the employee’s participation outweighs concern over the questioning of the “integrity of the agency’s programs and operations.” 5 C.F.R. § 2635.502(d). The factors that the Agency takes into consideration are:

- (1) the nature of the relationship involved;
- (2) the effect that resolution of the matter will have upon the financial interest of the person affected in the relationship;
- (3) the nature and importance of the employee’s role in the matter, including the extent to which the employee is called upon to exercise discretion in the matter;
- (4) the sensitivity of the matter;
- (5) the difficulty of reassigning the matter to another employee; and
- (6) adjustments that may be made in the employee’s duties that would reduce or eliminate the likelihood that a reasonable person would question the employee’s impartiality.

As Regional Administrator, you are the leader of your Region and part of the Agency’s political team. You will be asked to participate in discussions and meetings related to particular matters that affect Colorado. Because I conclude that the interest of the United States Government in your participation outweighs any concerns about your impartiality, I am authorizing you to participate as Regional Administrator in particular matters that involve the State of Colorado, but not for any interactions involving the Colorado House of Representatives as an entity. In making this determination, I have taken the following factors into consideration:

Nature of the relationship involved – First appointed and then elected twice, you served as a member of the Colorado House of Representatives from 2013 to January 2021. You did not hold any position with the state environmental regulatory agency through which Colorado shares responsibility with EPA in protecting human health and the environment. With respect to many of our statutes, EPA has directly delegated states with regulatory and enforcement authority. In fact, EPA, through its regions, works closely and directly with states on a continuing and frequent basis.

Effect of the matter upon your financial interest

I understand that you have a defined benefit plan with the State of Colorado. Although you have a financial conflict of interest pursuant to 18 U.S.C. § 208, it is not disqualifying. *See* 5 C.F.R. §§ 2640.201(c)(1)(ii) and 2640.201(c)(2). In EPA’s experience, it is unlikely you as the Regional

Administrator will be in any position to affect the State's ability or willingness to pay benefits to its retirees.

Nature and importance of the employee's role – In your role as Regional Administrator, you will be responsible for six states and 28 tribal nations. You will be expected to communicate freely with all of the states in your region, including Colorado.

Sensitivity of the matter – We anticipate that there will be specific party matters in which you may be asked to participate, including ones that merit your participation and raises nationally significant issues.

Difficulty of reassigning the matter to another employee – Your participation in nationally significant issues will be of importance to the Administrator.

While we have issued you this determination to interact with the State of Colorado, except for the Colorado House of Representatives nothing in this impartiality determination should preclude you from choosing to recuse yourself voluntarily, although you are advised to confer with OGC/Ethics or your Regional Counsel should such a circumstance arise. You should also consult with ethics officials if you have any questions about potential matters involving the Colorado House of Representatives as an entity.

This authorization will remain in effect for the remainder of your cooling off period. After January 13, 2022, you will no longer have a covered relationship with the State of Colorado under the impartiality standards and will no longer require this determination.

If you have any questions regarding this determination, or if a situation arises in which you need advice or clarification, please contact me at [fugh.justina@epa.gov](mailto:fugh.justina@epa.gov) or (202) 564-1786.

cc: Deb Thomas, Deputy Regional Administrator, Region 8  
KC Schefski, Regional Counsel, Region 8  
Brian Joffe, Regional Ethics Counsel, Region 8  
Michael Gleason, Regional Ethics Counsel, Region 8